No. 93-644

FILED
DEC 28 1993
OFFICE OF THE CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1993

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

REPLY BRIEF FOR THE PETITIONERS

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
** Counsel of Record*

BEST AVAILABLE COPY

TABLE OF AUTHORITIES

Page

Cases:

Chicago, Rock Island & Pacific Ry. v. *Cole*, 251 U.S. 54 (1919) 6

District of Columbia v. *Clawans*, 300 U.S. 617 (1937) 6

Gregg v. *Georgia*, 428 U.S. 153 (1976) 5

Herman v. *Sunshine Chem. Specialties, Inc.*, 627 A.2d 1081 (N.J. 1993) 2

Jurek v. *Texas*, 428 U.S. 262 (1976) 5

Kinard v. *Crosby*, 433 S.E.2d 835 (S.C. 1993) 2

Pacific Mutual Life Ins. Co. v. *Haslip*, 499 U.S. 1 (1991) 1, 2, 4, 6

TXO Production Corp. v. *Alliance Resources Corp.*, 113 S. Ct. 2711 (1993) . . . . . *passim*

United States v. *James Daniel Good Real Property*, No. 92-1180 (Dec. 13, 1993) 3

Van Lom v. *Schneiderman*, 210 P.2d 461 (1949) 4, 8

Miscellaneous:

56 Fed. Reg. 47,166 (1991) 4

In the Supreme Court of the United States

OCTOBER TERM, 1993

No. 93-644

HONDA MOTOR CO., LTD.; HONDA R&D CO., LTD.; AND AMERICAN HONDA MOTOR CO., INC., PETITIONERS

v.

KARL L. OBERG, RESPONDENT

On Petition for a Writ of Certiorari to the Supreme Court of Oregon

---

REPLY BRIEF FOR THE PETITIONERS

In our petition we pointed out that post-verdict review of damages awards has been an established part of American judicial procedures since the adoption of the Constitution, that Oregon is the only state in the Union that denies such review, that this Court in *Haslip* and *TXO* indicated that some form of judicial excessiveness review is required by the Due Process Clause, and that several state courts expressly have so recognized. Remarkably, Oberg ignores the impressive historical pedigree of post-verdict excessiveness review; he ignores that Oregon stands alone in denying such review; he ignores *TXO* entirely, while making only minimal reference

to *Haslip*; and he ignores the many state-court decisions interpreting *Haslip* and *TXO* to require post-verdict excessiveness review.[1] Instead of forthrightly addressing our arguments — and the question that we presented for review — Oberg seeks to evade review through a variety of irrelevant and ill-conceived contentions. None provides any basis for denying the petition.

1. Oberg argues (Br. in Opp. 11-13) that the punitive and compensatory damages are not excessive under the Due Process Clause. That contention confuses substantive and procedural due process. Honda is not pressing a substantive due process argument in this Court; rather, the contention is that the denial of any excessiveness review in the Oregon courts deprived Honda of *procedural* protections to which it is entitled. Whether or not Honda might ultimately succeed in persuading a court that the verdict is in fact excessive is irrelevant to the question whether it has a right to try.[2]

---

[1] Even the Oregon Supreme Court recognized that its decision conflicted with some of the state court decisions we cited. See Pet. App. 26a n.13. Accordingly, Oberg's bald assertion (Br. in Opp. 9-10) that the Oregon Supreme Court's decision does not conflict with any decision of this Court or any state supreme court or federal court of appeals is preposterous. Other, more recent, decisions with which the decision below conflicts include *Herman* v. *Sunshine Chemical Specialties, Inc.*, 627 A.2d 1081, 1085-1086 (N.J. 1993) ("[a]t a minimum, due process requires appellate review of the [punitive] award for reasonableness"), and *Kinard* v. *Crosby*, 433 S.E.2d 835, 839 (S.C. 1993) (a punitive damages regime is constitutional if, *inter alia*, "post-trial procedures enable the [trial] court to scrutinize the award" and "an appellate review process ensures that the award is reasonable and rational").

[2] This Court recently made the same point in reaching the merits of a procedural due process challenge to the federal forfeiture statute notwithstanding the fact that the property owner's likelihood of prevailing under the requested procedures was minimal:

Considering the merits of an excessiveness challenge at this stage would be particularly inappropriate because, contrary to Oberg's apparent assumption, Honda's claim would not be confined to whether the verdict is excessive as a matter of federal substantive due process. To the contrary, Oregon, like other states, has state-law standards governing the entitlement to compensatory damages and the imposition of punitive damages — standards that ordinarily would be more precise or exacting in various particulars than whatever comparatively modest limitations may be imposed on damages by substantive due process.[3] Accordingly, the first line of inquiry would be whether the verdict is excessive under the standards established by state law. That, of course, is not a function for this Court, which is part of the reason why the petition does not seek the Court's substantive review of the damages.[4]

> [T]the suggestion that this one petitioner must lose because his conviction was known at the time of seizure, and because he raises an as applied challenge to the statute, founders on a bedrock proposition: fair procedures are not confined to the innocent. *The question before us is the legality of the seizure, not the strength of the Government's case.*

United States v. *James Daniel Good Real Property*, No. 92-1180, slip op. 18 (Dec. 13, 1993) (emphasis added).

[3] Because Oregon's punitive damages statute provides specific criteria, Oberg is mistaken in asserting (Br. in Opp. 13) that the Oregon courts would need to develop new standards to evaluate excessiveness claims. In any event, there is nothing "improper" about urging the Oregon courts to "develop common law excessiveness standards" that are more rigorous than federal substantive due process standards.

[4] In any event, Oberg is quite wrong in contending (Br. in Opp. 12) that Honda has "no serious claim" that the punitive award is excessive. Although the jury may have found Honda's conduct to

2. Oberg repeatedly asserts (Br. in Opp. 11-12, 13, 17) that the Oregon Supreme Court in fact performed a comparative review of the punitive verdict in this case. That contention is erroneous. The Oregon Supreme Court did compare Oregon's procedures with the ones approved in *Haslip*, but that, of course, is not the same thing as providing review of the size of the verdict. In addition, the court mentioned in passing that the ratio of punitive damages to compensatory damages in this case is "similar" to the ratio in *Haslip*. Pet. App. 29a n.14. However, that single reference did not purport to embody a considered decision of an issue that the Oregon Supreme Court had expressly held in *Van Lom* and reaffirmed here to be outside its authority. Indeed, a mere comparison of ratios — with no consideration of any other relevant factor -- is unresponsive to the question whether the size of the punitive award can be justified under Oregon's

---

be "wanton," the indisputable truth of the matter is that the Consumer Product Safety Commission (CPSC), after extensively investigating three-wheeled ATVs, made no finding of defects and abandoned any effort to require a recall. Instead, it considered it sufficient to enter into a consent decree pursuant to which manufacturers agreed to send supplemental safety information to consumers and to cease producing three-wheeled ATVs pending development of a standard acceptable to the CPSC. See Pet. App. 74a-75a n.4. 56 Fed. Reg. 47,166, 47,168 (1991). When the relevant federal safety agency has concluded, after an extensive investigation, that a product is not so dangerous as to warrant a recall, a jury's imposition of a $5 million punishment *in a single case* — effectively trumping the agency's judgment — is precisely the kind of "unfair, arbitrary, or irrational seizure" of property (*TXO*, 113 S. Ct. at 2726 (Kennedy, J., concurring)) that raises serious substantive due process questions.

Similarly, Honda has a strong claim that the compensatory award is excessive. See Pet. 3 & n.2.

statutory criteria as well as the due process standards articulated by this Court in *TXO*.

3. Like the court below, Oberg suggests (Br. in Opp. 13) that procedural due process is satisfied by instructing the jury on the factors the Oregon legislature has concluded are relevant to a determination of the amount of punitive damages.[5] But no matter how well a jury is instructed, there remains an unacceptable risk that the jury's verdict will reflect arbitrary decisionmaking, rather than reasoned application of the guiding standards. Fundamental fairness requires that a defendant receive judicial review to ensure that the size of the verdict against it is not arbitrary or otherwise inconsistent with applicable legal principles.

4. Oberg places considerable reliance upon decisions of this Court stating that there is no constitutional right to *appellate* review. See Br. in Opp. 14-15.[6] That reliance is badly misplaced. This case is not about a system that permits

---

[5] Oberg also adverts to Oregon's requirement that punitive *liability* be established by clear and convincing evidence and its rule barring evidence of the defendant's financial condition until the plaintiff has made out a prima facie case for punitive damages. Br. in Opp. 13. Although both safeguards are desirable, neither in the least bit serves to protect defendants from excessive punitive awards once liability for punitive damages has been established.

[6] Oberg also asserts (Br. in Opp. 17) that this Court has approved capital sentencing systems that prohibit *trial* judges from overriding a jury's decision to impose the death penalty. Oddly, he ignores that the very reason that this Court has upheld such systems is that they provide for careful *appellate* review of death sentences. See, *e.g.*, *Gregg* v. *Georgia*, 428 U.S. 153, 198 (1976) (plurality opinion); *id.* at 211 (White, J., concurring); *Jurek* v. *Texas*, 428 U.S. 262, 276 (1976) (plurality opinion). Accordingly, the death penalty cases provide no support for Oregon's denial of review of damages awards at any level.

trial court review but denies appellate review. It is about a system that denies review by *any* court whatever.[7]

As we pointed out in the petition (at 14 n.9), this Court need not decide at this stage (or even at the merits stage) whether appellate review of punitive damages awards is

---

[7] Only one of Oberg's cases suggests that states can render a jury's determination completely unreviewable. *Chicago, Rock Island & Pacific Ry.* v. *Cole*, 251 U.S. 54 (1919). There, the Court held that, because the state did not need to permit a defense of contributory negligence at all, it was free to make the jury's factual determinations regarding that defense unreviewable. The present case, if anything, presents the polar opposite situation. Far from creating a new defense, Oregon has made available an additional (potentially boundless) vista of liability. Thus, the Court's statement in *Cole* that the defendant "cannot complain that its chance to prevail upon a certain ground is diminished when the ground might have been altogether removed" (*id.* at 56) has no application here.

Another of Oberg's cases indicates that states need not provide an appeal as of right from a trial judge's verdict in a misdemeanor case. *District of Columbia* v. *Clawans*, 300 U.S. 617, 627 (1937). There, unlike here, a judge was the initial decisionmaker, and the state did provide for discretionary appellate review, which this Court assumed would be exercised in "proper" cases. *Ibid.* Moreover, the Court's holding was based upon the fact that appeals from criminal convictions were not permitted as of right at common law. *Ibid.* By contrast, as we explained in the petition (at 7-8, 12-14), judicial review of damages awards was part of the common law and was incorporated into American jurisprudence from the outset.

Assuming, however, that *Cole* and *Clawans* could be construed to imply that due process requires no judicial review of jury verdicts, they would be in considerable tension with this Court's far more recent and more specific statements in *TXO* and *Haslip*. To the extent it exists, that tension is, if anything, a reason for granting the petition, not denying it.

constitutionally required. If it concludes that the Oregon courts' interpretation of the state constitution cannot be squared with the Due Process Clause, it will be up to the state legislature and the people of Oregon to determine in the first instance whether to permit trial court review, but deny appellate review. Given that Oregon generally provides appellate review of trial court rulings, there is no reason to suppose that it would choose to create a special rule with respect to the size of damages awards.

5. Oberg contends (Br. in Opp. 5-6, 10-11) that Honda did not adequately preserve its constitutional challenge to the compensatory award. Of course, even if Oberg were correct — and he is not — that would at most warrant limiting the grant of review to the punitive component of the judgment. However, no such limitation is necessary.

Oberg's contention that we failed to present our constitutional argument in the trial court is predicated upon the inaccurate assumption that the issue we raise in this Court is one of *substantive* due process. See Br. in Opp. 5 (stating that we challenged the award as excessive under state law rather than under the Due Process Clause). But our claim is that the Oregon courts' refusal to review the size of the compensatory award violated *procedural* due process.[8] We could not present that claim until after Honda's due process rights had been violated — *i.e.*, after the trial court declined to review the compensatory award. Accordingly, the failure to make a premature procedural due process claim at the trial level did not bar Honda from presenting such a claim in Oregon's appellate courts.

---

[8] Moreover, it is our position — with regard to both compensatory and punitive damages — that procedural due process requires the size of an award to be scrutinized for compliance not just with federal substantive due process, but also with state-law criteria.

Moreover, as Oberg concedes, Honda's petition for review in the Oregon Supreme Court expressly contended that the lower courts' refusal to review the compensatory verdict violated the Due Process Clause. Importantly, Oberg's brief in opposition did not assert that this issue had been waived. The issue thus was squarely before the Oregon Supreme Court.[9] Accordingly, Honda's procedural due process challenge is properly before this Court with respect to both punitive and compensatory damages.

---

[9] Because Oberg never claimed that Honda had waived its procedural due process challenge to the lower courts' refusal to review the compensatory award, there is no basis for his contention (Br. in Opp. 10) that the Oregon Supreme Court's failure to expressly address the compensatory award constitutes an implicit holding of waiver. It is far more sensible to understand the Oregon Supreme Court's silence as constituting a recognition that separate discussion of compensatory damages was unnecessary: if punitive awards are unreviewable, *a fortiori* so too are compensatory awards. See *Van Lom*, 210 P.2d at 468-470 (rejecting contention that, because of quasi-criminal nature of punitive damages, the courts might have power to interfere with punitive verdicts even though they lack power to interfere with compensatory verdicts).

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

JAMES H. GIDLEY
THOMAS W. BROWN
Cosgrave, Vergeer & Kester
Bank of America Financial Center
121 SW Morrison Street
Portland, Oregon 97204
(503) 323-9000

ANDREW L. FREY*
EVAN M. TAGER
Mayer, Brown & Platt
2000 Pennsylvania Ave., N.W.
Washington, D.C. 20006
(202) 778-0602

JEFFREY R. BROOKE
PAUL G. CEREGHINI
Bowman & Brooke
100 West Clarendon
Phoenix Townehouse
Phoenix, Arizona 85013
(602) 248-0899

Counsel for Petitioners
** Counsel of Record*

DECEMBER 1993